STATE PERSONNEL BOARD, STATE OF COLORADO

CASE NO. 97B165(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DEBORAH PAYNE-BLAKE,

COMPLAINANT,

vs.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER,

RESPONDENT.

Hearing was held on October 18, 1999 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Steven Zweck-Bronner, Senior Assistant University Counsel. Complainant represented herself.

Complainant testified on her own behalf and called as a witness Charlotte Klaus, Director of Budget & Finance and the appointing authority for the School of Pharmacy for the University of Colorado Health Sciences Center, who was present as respondent's advisory witness.

Given the disposition of this case, respondent did not call any witnesses.

Complainant's Exhibits A through Y were admitted into evidence by stipulation of the parties. Exhibit Z was admitted over objection. Exhibit AA was not admitted.

Respondent's Exhibits 2 through 30 were admitted by stipulation. Exhibit 1 was admitted over objection.

MATTER APPEALED

Complainant appeals the administrative termination of her employment for exhaustion of leave and two prior grievances. For the reasons set forth below, respondent's actions are affirmed.

ISSUES

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;

2. Whether complainant was discriminated against on the basis of disability.

PRELIMINARY MATTERS

Complainant asked to be allowed to call Dr. Nagel as a medical expert. The request was denied upon respondent's motion to exclude the testimony for complainant's failure to give notice to respondent.

Respondent moved to dismiss the appeal on grounds of complainant having failed to request a CCRD investigation in a timely manner. The motion was denied. Complainant did not waive her right to a hearing before the State Personnel Board.

The witnesses were sequestered per complainant's request, except for complainant and respondent's advisory witness, Charlotte Klaus.

FINDINGS OF FACT

1. Complainant, Deborah Payne-Blake, was certified as an Administrative Assistant III for the School of Pharmacy of the University of Colorado Health Sciences Center (UCHSC) from May 1, 1993 until her administrative dismissal on June 10, 1997.

2. Complainant was diagnosed with the condition of narcolepsy in 1975. Narcolepsy is a condition that causes sudden attacks of sleep.

3. Complainant's duties were to provide administrative support for the externship programs, *e.g.,* continuing education.

4. In January 1996, Jan Anderson became complainant's supervisor. Complainant's responsibilities increased.

5. Complainant's job performance suffered both in terms of quality and quantity. She had difficulty meeting deadlines and experienced stress. She had been having similar performance problems since before 1995.

6. On one occasion, complainant was asked to take the minutes of a 4:00 p.m. meeting, to which she objected because she could not concentrate after 4:00 in the day. She attended the meeting and did a poor job of taking minutes. She started falling asleep by 4:30, and Anderson allowed her to leave. Anderson offered her the opportunity to tape record the meeting and take the minutes in the

morning when she was alert. Complainant did not like this idea. She wanted to have someone assist her in the performance of her duties.

7. Complainant complained of an overload of work and requested a part-time assistant to help in the performance of her duties, and/or that her job be restructured.

8. Nineteen days after the above meeting, Anderson asked complainant for the minutes and found them unacceptable. She issued complainant a warning letter concerning the poor quality of her work, and complainant filed a grievance over it.

9. Anderson and Charlotte Klaus, the appointing authority, offered to meet with complainant in August 1996 to discuss her job difficulties and ideas with respect to assisting her or making accommodations to enhance her performance. Complainant declined the offer because she did not want to meet with two managers at the same time without having a representative present She did not trust them. She believed that the personnel rules said that an employee did not have to meet with more than one manager at a time. This was not a disciplinary meeting in any sense, but rather was presented as an opportunity to hear what complainant had to say. The meeting did not take place because complainant would not attend without a representative.

10. On August 20, 1996, Dr. Kim Nagel, a psychiatrist, reported that complainant was unable to perform any work for two to three months due to depression. (Exhibit I.) Thereafter, complainant took off work for several months. She returned in January 1997.

11. Upon her return to work, complainant was able to talk to the ADA coordinator (Exhibit U) and the director of human resources (Exhibit V) about the duties of her position. She felt she was working beyond her job description.

12. On March 4, 1997, complainant received a corrective action for poor job performance, which she grieved. She was having problems with the performance of her duties, and this is why she requested an assistant.

13. On April 1, 1997, Dr. Nagel reported that complainant would be unable to perform any work for a period of three to six months due to depression. (Exhibit N.) Complainant then left her position.

14. By letter dated June 10, 1997, Human Resources Director George Thomas administratively terminated complainant's employment under Procedure 7-2-5(D)(3) for inability to return to work following the exhaustion of all leave based upon medical information of June 6 (Exhibit 22) indicating that complainant was unable to perform any work. She had exhausted all sick and annual leave, family medical leave and short-term disability leave. She had applied for long-term disability leave.

(Exhibit 23.) According to complainant, the doctor told her that she could never go back to the job she held.

15. Complainant was placed on the departmental re-employment list for one year, contingent upon her recovery during that time. (Exhibit 23.)

16. Deborah Payne-Blake filed a timely appeal of her administrative termination and now asks the State Personnel Board to order that she be returned to work in a different position on a part-time basis, that is, four hours per day, based upon a medical certificate of June 4, 1998 stating that she would be able to work on a reduced schedule of four hours per day beginning June 10, 1998, one year after her administrative termination. (Exhibit 24.) This appeal was consolidated with her two grievances.

17. Complainant has since been awarded permanent disability benefits. She testified that the terms of her permanent disability benefits allow her to work up to four hours per day.

DISCUSSION

This is an appeal of an administrative termination. Unlike a disciplinary case, the burden of proof by a preponderance of the evidence rests with complainant to show that respondent's action was arbitrary, capricious or contrary to rule or law. *See Department of Institutions v. Kinchen,* 886 P.2d 700 (Cob. 1994); section 24-50-103(6), C.R.S. Complainant also carries the burden to prove that she was discriminated against on the basis of disability.

At the close of complainant's case-in-chief, respondent moved for a directed verdict on grounds that complainant had not made a *prima fade* showing either that respondent's actions were arbitrary, capricious or contrary to rule or law or that she was a person entitled to protection under the Americans With Disabilities Act (ADA). Respondent's motion was granted.

A motion for a directed verdict can only be granted when the evidence, considered in the light most favorable to the nonmoving party, compels the conclusion that a reasonable jury could not find in favor of the nonmoving party. *McGlasson v. Bargar,* 431 P.2d 778, 779 (Cob. 1967); *accord, e.g., Smith v. City & County of Denver,* 726 P.2d 1125, 1128 (Cob. 1986).

Complainant concedes that, at the time of her dismissal, she was unable to perform any of her job duties because of depression. Consequently, she was unable to perform the essential functions of her position with or without accommodation and was not a person with a disability within the meaning of the ADA. The ADA is intended to protect persons with a disability from employment discrimination when they are able to perform the essential functions of the position with or without reasonable

accommodation. It is not intended to protect the jobs of individuals who admittedly cannot perform any of the duties of the job. It is undisputed here that complainant was medically excused from all work and had no accrued leave of any kind at the time of her administrative dismissal pursuant to Procedure 7-2-5(D)(3), 4 CCR 801-2, which provides the appointing authority the discretion to terminate complainant's employment under these circumstances. There was no showing of agency abuse of this discretion.

Complainant argues that the agency did not engage in an interactive process to accommodate her under the ADA. Yet, she was allowed to tape record the afternoon meeting and take minutes during morning hours when she was presumably able to concentrate. Her supervisor and the appointing authority offered to meet to discuss whatever assistance or accommodations she needed to perform her job, but she instead insisted that she did not have to meet with two managers without a personal representative. This was not a predisciplinary meeting, but rather was an opportunity to talk. An interactive process is a two-way street. As it turned out, she was able to meet with the agency's ADA coordinator and the director of human resources.

Complainant's real problem was that her overall job performance was deficient, which she admits. In her view, she had too much work to do, and she was depressed. She did not specifically ask for a reasonable accommodation pursuant to the ADA, but she complained that she was working outside the job description of an Administrative Assistant Ill. She thought that the job should be restructured or she should be assigned a part-time assistant to help with the workload. The employer is not required to do this. In the end, she could not perform any duties at all. A year after her dismissal, she received medical authorization to work four hours per day in a position with less stress than the one she held in June 1997. This is relief the State Personnel Board cannot grant. At the time the decision was made, the appointing authority's conclusion was reasonable. An appointing authority is not required to hold a position indefinitely for an employee who has no accrued leave and may or may not be able to work again.

Thus, at the close of the presentation of her evidence, complainant had not demonstrated that respondent's actions were arbitrary, capricious or contrary to rule or law or that she deserved job protection under the ADA. She had not presented sufficient evidence to proceed.

CONCLUSIONS OF LAW

1. Respondent's actions were not arbitrary, capricious or contrary to rule or law.
2. Complainant was not discriminated against on the basis of disability.

ORDER

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this 30th day
of November, 1999, at
Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of November, 1999, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the U.S. mail, postage prepaid, addressed as follows:

Deborah Payne-Blake
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University of Colorado - HSC
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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("AU").

2. To appeal the decision of the AU to the State Personnel Board ("Board"). To appeal the decision of the AU. a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the AU is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the A.LJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Cob. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Cob. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the AU, then the decision of the AU automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d *657* (Cob. App. 1990).

PETITION **FOR** RECONSIDERATION

A petition for reconsideration of the decision of the AU may be filed within *5* calendar days after receipt of the decision of the AU. The petition for reconsideration must allege an oversight or misapprehension by the AU. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the AU.

RECORD ON **APPEAL**

The party appealing the decision of the AU must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is S50.OO (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on S *V2* inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.